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No. 05-806

IN THE

Supreme Court of the United States

GARY S. WEBBER, PETITIONER

v.

INTERNATIONAL PAPER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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I. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *O'CONNOR*.

Respondent argues that the First Circuit's decision was not based upon Mr. Webber's alleged failure to establish a prima facie case, but rather upon the failure of his evidence as a whole to demonstrate disability discrimination. This argument is disingenuous. The entire First Circuit opinion evolves from that court's erroneous statement of the prima facie case requirements, which the court held includes the requirement that Mr. Webber demonstrate that the favored employees were not disabled.[1]

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[1]The First Circuit stated:

> Webber was required to establish a prima facie case of discrimination, by adducing competent evidence that (1) he was a member of a protected class (viz., "disabled"); (2) he satisfied his employer's legitimate job performance expectations; (3) his employer terminated him; and (4) his employer did not accord similar treatment to persons outside the protected class.
>
> . . .
>
> Webber maintains that he was not required to establish that the eight engineers retained by IP were not disabled, because, unlike such obvious attributes as race or gender, disability (or lack thereof) is too difficult of proof. He cites no authority for such an exception to the fourth element; nor have we found any. Prima facie proof of coemployees' non-disability may be somewhat more fact-intensive than proof of their race or gender, but the burden is neither unreasonable nor onerous. Webber presumably had ample opportunity to discover this sort of information, and had he proffered even minimally competent testimony that the retained engineers suffered from no such disability, IP would have had the burden to counter Webber's assertions with contrary evidence, if any existed. We can discern no

As set forth in Mr. Webber's petition for a writ of certiorari, this stated requirement of the prima facie case is in conflict with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308 (1996), as well as being in conflict with case law from other circuit courts of appeal (including many of those cases cited in Respondent's brief) which do not require a showing that favored employees in a reduction in force were outside the protected class.

Respondent next argues that even if the First Circuit's formulation of the prima facie case requirements to include a showing that retained employees were not within the protected class (i.e., disabled), the First Circuit's decision nonetheless cannot conflict with *O'Connor* because *O'Connor* did not involve a reduction in force but rather a single termination. This argument is equally unavailing. If an

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> sound reason for excusing a claimant from adducing such straightforward evidence as part of his prima facie case.

Webber v. International Paper Co., 417 F.3d 229, 234 (1st Cir. 2005)(citations omitted). The First Circuit further held:

> As Webber adduced no evidence from which the jury rationally could have determined whether the retained or terminated employees were disabled, he completely failed to carry his burden of proof on the fourth element of his prima facie case, which required that he demonstrate that IP either retained no employees who were disabled, or terminated other employees who were disabled.

Id. at 235. As such, it is readily apparent that the First Circuit's decision was improperly tainted by its belief that Gary Webber was required to prove that the retained employees were non-disabled, which is contrary to *O'Connor*.

employer may not fire a single employee in favor of another within the same protected class, it certainly may not choose an employee for termination in a reduction in force over another within the protected class. In no event may an employer discriminate against an individual on the basis of a protected classification even if it replaces that individual with or retains other employees who are within the same protected class. The First Circuit's heavy reliance upon the lack of evidence that the retained employees were not disabled was simply erroneous and in conflict with the principles espoused in *O'Connor*.

II. THE FIRST CIRCUIT'S DECISION MISAPPLIES THE STANDARD OF REVIEW MANDATED BY *REEVES*.

As discussed below, the question of what happens in a reduction in force is never limited to what happened to particular employees within an individual's precise job classification. Respondent wishes this Court to focus only on the Engineering Department, and it misrepresents what the actual trial evidence was. Thus, at page 8 of its brief in opposition, Respondent refers to "Oettinger's **uncontradicted** testimony that he had to reduce the 'technical' staff (including engineers) by eight." (emphasis in original). The problem was that Oettinger's testimony was contradicted by IP's own witnesses. The eight "technical" staff that Oettinger claimed were eliminated were not. Three of those technical staff who were scheduled to be eliminated kept their jobs as three older employees took generous early retirement packages. A-460. A fourth, George Reed, was given a retirement date almost two years into the future. A-460. A fifth, Debbie McAllian, was

given a retirement date a year into the future and still works at the mill. A-461, 462. A sixth, Marcia Wood, was given a retirement date a year into the future. A-462. Thus, despite Oettinger's claim that he fired eight technical people on June 25, 2001, only two individuals lost their jobs that **year** and Mr. Webber was the only one ordered off the premises that day. A-145-148.

Two engineers, Jeremy Chubbuck and Steve Morin, were transferred to maintenance in April or May of 2001 in anticipation of the upcoming down-sizing and were not, by virtue of that transfer, down-sized. A-294-295. Mr. Webber had been asking for a similar transfer to the SQA coordinator position, A-118, but was denied that transfer. Mr. Oettinger, at his deposition, claimed that Mr. Webber wasn't given that position because it wasn't vacant at the time of the down-sizing, A-244-247, a claim which was established to be untrue, since the position had been vacant for two months at the time of Mr. Webber's termination, A-120, and the position was not subject to the corporate downsizing, A-245.

Respondent argues that it had no obligation to transfer Mr. Webber into the SQA Coordinator position in its "reduction in force," and that its failure to do so is not evidence of discrimination. While Respondent correctly cites the general rule from *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533, 539 (1st Cir. 1996), that "an employer is not obligated to offer an employee a transfer or relocation during a reduction in force", the applicability of that rule depends on the facts and circumstances of a particular case. Mr. Webber was not given similar consideration as the other employees referenced above who were either

transferred or given retirement dates well in the future, but was in fact was escorted off the premises that same day without even being permitted to say good-bye to his co-workers or collect his belongings.

Although there is generally no requirement in a reduction in force to transfer a laid-off employee to another position, if the employer does in fact offer transfers (or retirement packages or future termination dates) to some employees, it may not deny the same benefit to employees in a protected class. See, e.g., *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 615 (7th Cir. 2000) (in an age discrimination case, holding that when internal job placement services are benefits of employment which are provided to younger employees, an employer must provide roughly the same benefits to ADEA-protected employees, and when an employer responds to a reduction in force by transferring employees to available positions, it may not refuse to transfer older employees based on their age)(citing *Kusak v. Ameritech Info. Sys., Inc.*, 80 F.3d 199, 201 (7th Cir. 1996); *Taylor v. Canteen Corp.*, 69 F.3d 773, 780 (7th Cir. 1995)). "A claim that an employer refused to provide equal assistance in finding a transfer for a protected employee requires a showing that there was an available position for which the plaintiff was qualified." *Radue*, 219 F.3d at 615 (citing *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 919 (7th Cir. 2000); *Taylor*, 69 F.3d at 779-80). See also *Montana v. First Fed. Sav. & Loan Ass'n of Rochester*, 869 F.2d 100, 105 (2nd Cir. 1989)(the failure to offer the plaintiff another available position for which she qualified was a relevant factor from which discrimination could be inferred); *Rollins v. Techsouth, Inc.*, 833 F.2d 1525, 1532 (11th Cir. 1987)(evidence that the plaintiff was the oldest

employee in the accounting department and was the only one fired, while two younger employees were transferred rather than fired, raised an inference of discrimination); *McGill v. Reynolds Metal Co.*, 169 F.Supp.2d 966, 971 (W.D. Ark. 2001)(same).

In the present case, not only was there evidence of a policy of retaining engineers due to their value to the mill, there was specific evidence of two other engineers who were transferred to different departments in order to avoid terminating them under Functional FAST. Although Mr. Webber had previously applied for the SQA Coordinator position, which was vacant at the time of his termination and was not subject to Functional FAST, IP failed to transfer him to that position. Mr. Webber was clearly qualified for the position of SQA Coordinator, as IP offered him that position three months after his termination, after it had received notice that Mr. Webber had begun legal proceedings. Under these circumstances, IP's **still unexplained** decision not to transfer Mr. Webber to the available SQA Coordinator position rather than terminate his employment is probative evidence of disability discrimination.

It is also irrelevant that Mr. Webber agreed that he was not more qualified[2] than four of the 10 engineers who were retained or transferred while he was terminated. The issue is not whether Mr. Webber was

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[2]Mr. Webber testified only that he was not more qualified than these individuals. Mr. Webber was not asked whether he was less qualified than those individuals, and the jury could have inferred that Mr. Webber was equally qualified as these four people.

more or less qualified than every project engineer who was not terminated, but whether his disability was the motivating factor in his selection for termination. See, e.g., *Rathbun*, 361 F.3d at 74 ("When an employer claims to have hired or promoted one person over another on the basis of qualifications, the question is not which of the aspirants was better qualified, but, rather, whether the employer's stated reasons for selecting one over the other were pretextual.")(citing *Smith v. F. W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996)); see also *Thomas*, 183 F.3d at 58 ("The ultimate question is whether the employee has been treated disparately because of [a protected characteristic]."). IP **never** explained its failure to transfer Webber to the SQA coordinator position. Thus, the fact that Gary Webber admitted that he was not more qualified than four of the 10 engineers who were retained is irrelevant. Moreover, although he did not identify them by their names at trial, he did testify that he was more qualified than the other project engineers who were retained. A-203.

Respondent misrepresents the record when it suggests at footnote 1 of its brief in opposition that "[t]he record does not support Webber's claim that there was a long delay in implementing any of the accommodations International Paper afforded Webber." The first accommodation Mr. Webber requested was a transfer to the SQA coordinator position, since it was a more sedentary job and wouldn't require the constant movement among all three floors of the building which housed the Engineering Department. A-118. This accommodation wasn't afforded to him until after he had been fired and brought a claim of disability discrimination. The second

accommodation he requested, which was never granted, was that there be an elevator installed to service all three floors, A-105. Instead, Mr. Webber was required to use a freight elevator which raised him one of the two floors needed. On the many days that the freight elevator did not work, Mr. Webber would actually have to walk down an embankment from a parking lot, walk across a train trestle, through a machine shop, and then up the last flight of stairs to the Engineering Department. A-99. Even the installation of the "Costanza chair" only saved him 13 of the 30 steps between the second and third floors. A-100. The other accommodations Respondent trumpets were accommodations mandated by Mr. Webber's physician, that his work hours be cut back to four hours a day, four days a week, A-105, and that he be allowed to work at home during his initial recovery period. A-106-107. Undoubtedly, since Webber was being paid salary on a short-term disability, IP preferred to have him do some work, than to simply draw a paycheck while he was recovering. Thus, Respondent's accommodations were grudging, incomplete, and, in the case of the "Costanza chair," accompanied by ridicule from his direct managers. A-109, A-110-111, A-294.

Mr. Webber was the only individual who used the chair glide, A-109, and therefore the only person ridiculed by its nickname of the "George Costanza stairway." Although Mr. Webber had had a handicapped license plate since 1999, A-111, the "George Costanza chair" was not installed until late July of 2000, A-109.

Finally, Respondent, at page 10, misperceives the import of the emphasis that Oettinger and Dr. Read

placed upon the avoidance of work-place injuries. When Dr. Read ordered Mr. Webber off the mill premises in early 2001, A-396, he was concerned only about Mr. Webber getting injured on **mill** premises, not being injured at home. Similarly, the mill, under Oettinger's direction, had been rewarded for having gone so long without workplace injuries. The fear of the disabled as being injury-prone, although benign, is as archaic as the fear that women, as the weaker sex, cannot handle a construction job, or that blacks in the Pittsburgh steel mills were better suited for work in front of the blast furnace than at other less hot and more remunerative positions. Factoring an individual's disability, gender, or race into the decision-making process is illegal whether the belief is benign or malignant.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Webber's petition for a writ of certiorari because the First Circuit's decision conflicts with two Supreme Court cases, *Reeves* and *O'Connor*.

Respectfully submitted,
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